

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

ROBERT HOLMAN,)
Plaintiff,)
v.) Civil Action No. 1:21-cv-01085-STA-jay
THOMAS J. VILSACK, in his official)
capacity as Secretary of the United States)
Department of Agriculture, and)
ZACH DUCHENEAUX, in his official)
capacity as Administrator of the Farm Service)
Agency,)
Defendants.)

**RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR
RECONSIDERATION [Doc. 58]**

Pending before this Court is the government's Motion for Reconsideration of Stay Decision or to Stay Discovery and other Case Deadlines Pending Resolution of Motion to Dismiss. (Doc. 58.) This Court partially granted the government's motion for reconsideration staying discovery and other case deadlines (Doc. 59) meaning the larger question of whether to reconsider the stay decision remains open. As the submitted supplemental authority indicates, the Court should not reconsider the original decision even if the government prevails in its motion to dismiss. (Doc. 57.) Plaintiff respectfully requests the opportunity to file a response to the government's motion when the Court lifts the stay on case deadlines.

Plaintiff submits the following opinion as supplemental authority: *Kent v. Vilsack*, No. 3:21-cv-540-NJR (S.D. Ill., Nov. 10, 2021) (attached as Ex. 1). In *Kent*, the United States District

Court for the Southern District of Illinois issued an Order denying Defendants' Motion to Stay Pending a Resolution of a Related Class Action, *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.).

Kent is relevant, persuasive authority. In *Kent*, the Court found that the claims, parties, and damages sought are sufficiently distinguishable from those at issue in *Miller*:

Here, the claims are different. In *Miller*, the plaintiffs are alleging the Department of Agriculture's racial exclusions violate the Title VI of the Civil Rights Act of 1964. *See Miller v. Vilsack*, 4:21-cv-595 (Sept. 22, 2021). Here, Plaintiffs allege a violation of the Fifth Amendment to the Constitution (Count I) and a violation of the Administrative Procedure Act (Count II).

Besides the difference in claims, the plaintiffs in the *Miller* litigation are not naming the Administrator of the FSA as a defendant. Here, Plaintiffs note that the "FSA is the entity that provided Plaintiffs' loans and possess the relevant paperwork, Plaintiffs believe that FSA and its officers could prove to be a valuable source of factual information." (Doc. 21, p. 11). This is a significant difference in the cases as counsel in *Miller*, according to Plaintiffs, does not believe that factual discovery is necessary. (*Id.*).

Further, the plaintiffs in the *Miller* litigation are not seeking nominal damages. This is also significant because a change in the Section 1005 program may moot the *Miller* litigation, while nominal damages may prevent mootness in this case. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021).

See Kent v. Vilsack, No. 3:21-cv-540-NJR, *4-5 (S.D. Ill., Nov. 10, 2021).

The factors that distinguish *Kent* from *Miller* largely echo the factors in the case at hand.

Plaintiff respectfully submits this supplemental authority as Exhibit 1 as helpful to the question of whether a stay is appropriate, assuming the Court grants any part of the government's motion to dismiss. Plaintiff respectfully asks this Court to allow Plaintiff to submit a response to the government's motion to reconsider the stay decision before the Court rules upon it.

Dated: November 22, 2021.

Respectfully submitted,

s/ B.H. Boucek

BRADEN H. BOUCEK
TN BPR No. 021399
GA Bar No. 396831
CELIA H. O'LEARY*
GA Bar No. 747472
Southeastern Legal Foundation
560 W. Crossville Road, Suite 104
Roswell, GA 30075
Telephone: (770) 977-2131
bboucek@southeasternlegal.org
coleary@southeasternlegal.org

s/ William E. Trachman

William E. Trachman*
CO. Bar No. 45684
Mountain States Legal Foundation
2596 S. Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
Facsimile: (303) 292-1980
wtrachman@ mslegal.org
*Appearing Pro Hac Vice

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I filed the documents on the Court's electronic filing system. I future certify that I served the following persons in the manner indicated below.

Counsel	Via
Emily Newton U.S. Department of Justice 20 Massachusetts Ave. NW Washington, DC 20530 202/305-8356 Fax: 202/616-8470 Email: emily.s.newton@usdoj.gov	<input type="checkbox"/> United States mail, postage prepaid <input type="checkbox"/> Hand delivery <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> FedEx <input checked="" type="checkbox"/> Efile
Kyla Snow DOJ-Civ Federal Programs Branch 1100 L. St. NW Washington, DC 20005 202/514-3259 Email: kyla.snow@usdoj.gov	
Audrey Calkins United States Attorney – Western District of Tennessee 167 N. Main Street, Suite 800 Memphis, TN 38103 901/544-4231 Fax: 901/544-4230 Email: audrey.calkins@usdoj.gov	

Dated: November 22, 2021.

Respectfully submitted,

s/ B.H. Boucek
BRADEN H. BOUCEK